

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1504

IN THE
United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

v.

ANTHONY JAMES SEBASTIAN and
PATRICK GIBBONS,
Defendants-Appellants.

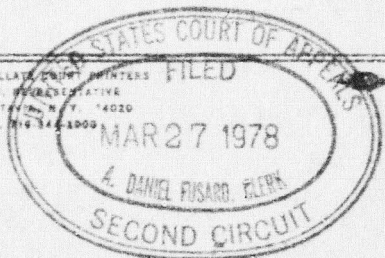
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

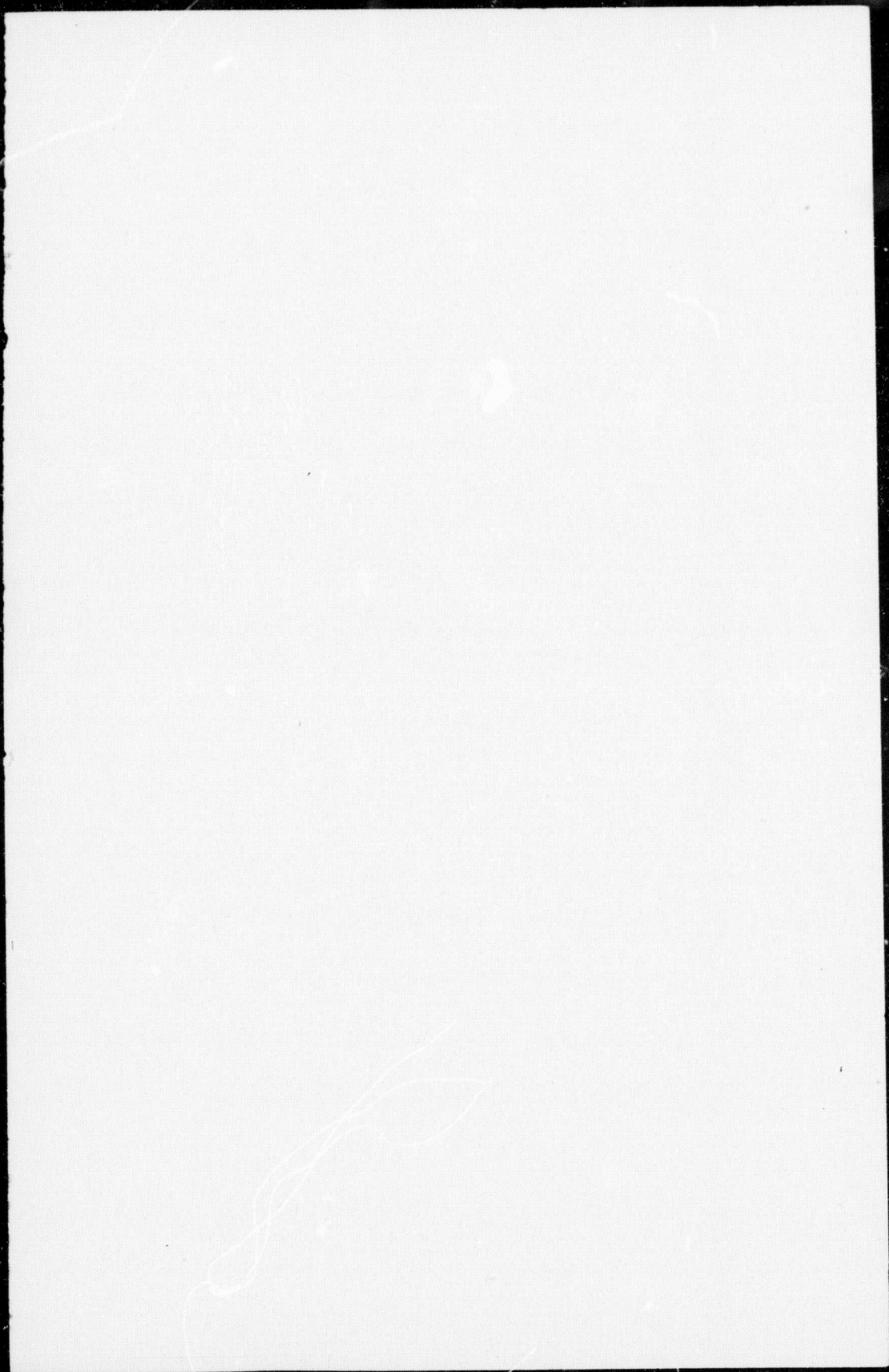
BRIEF FOR THE APPELLEE

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UNITED STATES OF AMERICA,

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v.

ANTHONY JAMES SEBASTIAN and

PATRICK GIBBONS,

Defendants-Appellants.

On Appeal From The United States District Court For
The Western District of New York

BRIEF FOR THE APPELLEE

Preliminary Statement

This case has had a relatively long history having been twice before this Court, first on an appeal by the government from a Decision and Order of the Hon. John T. Curtin, United States District Court Judge for the Western District of New York suppressing certain evidence, *United States v. Sebastian and Gibbons*, 497 F.2d 1267 (2nd Cir. 1974) and most

recently on an appeal by the defendants challenging a Decision and Order of the same judge denying their motion to dismiss on the grounds of former jeopardy, *United States v. Sebastian and Gibbons*, 562 F.2d 211 (2nd Cir. 1977).

These defendants were first accused by a complaint filed with the United States Magistrate for the Western District of New York on May 24, 1973 charging them with conspiring to forge and utter certain stolen United States Savings Bonds, in violation of 18 USC § 371 (A. 8).¹ Each was arraigned promptly and on June 21, 1973, prior to a preliminary hearing a three count indictment was filed with the Clerk of the Court charging Anthony James Sebastian and Patrick Gibbons with two counts of passing and uttering or "putting forth" obligations of the United States, in violation of 18 USC § 472, and one count of conspiring to do the same, in violation of 18 USC § 371 (A. 10-12).

As a consequence of a statement obtained from Sebastian and various items of physical evidence seized from the presence of Gibbons, a suppression hearing was scheduled which resulted in a Decision and Order of Judge Curtin suppressing the evidence on the ground that the government failed to turn over at the time of the hearing the various materials pursuant to 18 USC § 3500. This Court then reversed. *Sebastian I, supra*.

That indictment ultimately came on for trial on May 4, 1976 at which a jury was selected and sworn with commencement of proof scheduled to begin on May 7, 1976. "On that day the United States Attorney advised the court that he had concluded that under no theory of the government's proof could violation of Section 472 be proved since the savings bonds were valid and only the endorsements were forged.

¹ Reference to appendix.

Those facts, he continued, would constitute a violation of Section 495. The government moved to dismiss the indictment, reserving its right to seek a reindictment. Defense counsel agreed that the indictment would be vulnerable to a motion to dismiss on the facts as the government stated them, and, not objecting to the dismissal, reserved their right to move against any future indictment or information. The indictment was thereupon dismissed." *Sebastian II*, at 213.

On June 24, 1976, these defendants were then indicted on 36 counts of aiding and abetting another to unlawfully forge the endorsement of the owner of the bonds, in violation of 18 USC § 495 and for conspiring to do those acts, in violation of 18 USC § 371 (A. 56-58).

On September 20, 1976 each moved to dismiss the superseding indictment on the ground that double jeopardy precluded their trial and on the further ground that each was denied his right to a speedy trial. Following briefing and oral argument, the District Court Judge, Hon. John T. Curtin, filed a well-reasoned Decision and Order denying the defendants' motion to dismiss on those grounds. This Court affirmed that decision and order finding that: "The double jeopardy claim necessarily fails. The offenses of Sections 472 and 495 are distinctly different." *Sebastian II*, at 214.²

The superseding indictment then came on for trial on October 25, 1977. At that time each of the defendants entered a plea of guilty to Counts I and II of that indictment (A. 7). On December 6, 1977, Sebastian was remanded to the custody of the Attorney General for a period of 18 months and Gibbons to the custody of the Attorney General for a period of 2 years.

At the time of the entry of their pleas, the defendants reserved their right to appeal so much of Judge Curtin's

² This Court previously dismissed the speedy trial claim as a non-final, non-appealable order.

Decision and Order of March 14, 1977 (A. 73-96) which denied their motion to dismiss on the grounds that they had been denied their right to a speedy trial.³ This appeal challenges that portion of that decision and order not previously considered by this Court.

Statement of Facts

As indicated, the first charges against these defendants for the events of May 26, 1972, came on May 24, 1973 when they were charged in a complaint filed before the United States Magistrate. Counsel for the appellants make reference to the fact that Gibbons had been arrested previously (Br. p. 5), and Judge Curtin alluded to an arrest in December, 1972 (A. 87); that arrest, however, was on an unrelated charge in the State of Ohio stemming from the passing of bad checks.

Each was arraigned promptly on that complaint. Prior to a preliminary hearing, and on June 21, 1973 a three count indictment was filed with the Clerk of the Court charging Anthony James Sebastian and Patrick Gibbons with two counts of passing and uttering or "putting forth" obligations of the United States, in violation of 18 USC § 472, and one count of conspiring to do the same, in violation of 18 USC § 371 (A. 10-12).

On June 28, 1973 Sebastian and Gibbons were arraigned and continued free on bail, neither ever having been incarcerated on the federal charges. The court then scheduled July 26, 1973 as the return date for defense motions. Those motions were filed the day previous and the government responded on August 1, 1973. The matter then appeared on Judge Curtin's calendar for September 13, 1973 for a status report. There being no appearance by either of the defen-

³ The practice of entering a guilty plea and preserving certain rights for appeal has been previously approved by this Court.

dants, it was adjourned to September 20, 1973, at which time defendants reported to the court that they sought more information from the government. The government responded on October 4, 1973. The matter was then scheduled for a further appearance on October 18, however, the defendants failed to appear and it was rescheduled for November 1, 1973. At that time a suppression hearing was scheduled for December 12, 1973. In the interim and on November 29, 1973, the government filed its notice of readiness for trial.

The hearing was then held on December 19 and as a result of the government's refusal to turn over to defense counsel certain materials pursuant to 18 USC § 3500, the court issued its Decision and Order of December 21, 1973 suppressing the evidence. On January 14, 1974 the government filed its Notice of Appeal. On June 6, 1974 this Court reversed Judge Curtin's order. *Sebastian II, supra*. On August 15, 1974 defendants' Petition for Rehearing was denied. On September 16, 1974 the mandate was filed with the Clerk of the District Court. The matter was then placed on the court calendar for October 21 to determine the status of a Petition for Certiorari. At that time defendants did not appear and it was adjourned until December 9, 1974 at which time the government informed the court that it remained ready for trial.

A continuation of the suppression hearing was then scheduled for April 22, 1975 and defendants sought an adjournment. It was rescheduled for May 19, and the defendants again sought an adjournment, the continuation of that hearing finally being held on June 18, 1975. At the conclusion thereof and at the request of counsel for Sebastian, the court adjourned the hearing until August 8, 1975 for purposes of taking psychiatric testimony. By letter dated June 26, 1975 the government advised both counsel to communicate immediately any claim that they were being denied their right to a

speedy trial.⁴ No objection was ever made. Indeed, the first time any claim was made that either defendant was denied his right to a speedy trial was by motion in September, 1976.

⁴ Letter dated June 26, 1975 to George P. Doyle, Esq., attached.

Roger P. Williams

?PW:gmc

June 26, 1975

CR. 1973-237

George P. Doyle, Esq.
10 Ellicott Square Bldg.
Buffalo, New York 14203

Re: *U. S. v. Sebastian and Gibbons*
Criminal 1973-237

Dear Mr. Doyle:

As you recall, the co-defendant requested an adjournment of the continued suppression hearing held June 17, 1975 for purposes of putting in psychiatric testimony.

On June 24, 1975, at the request of Mr. Abramowitz, the court set August 8, 1975 for that purpose.

Certainly, the court needs time to determine the admissibility of the evidence seized from your client; however if you have any claim that this delay has the effect of denying your client a right to a speedy trial, please communicate your objection immediately.

Very truly yours,

RICHARD J. ARCARA
United States Attorney

By: ROGER P. WILLIAMS
Assistant U. S. Attorney

ccs: Honorable Joht T. Curtin
Chief Judge
United States District Court

Philip B. Abramowitz, Esq.
76 Niagara Street
Buffalo, N. Y. 14202

By order filed July 7, 1974 there was a substitution of counsel for Sebastian. Ultimately, on October 6, 1975, the court filed a letter from that counsel dated October 3, 1975 wherein counsel advised that he wished to submit nothing further. The court then scheduled October 28, 1975 as the date for filing findings of fact and conclusions of law. The government filed its in a timely fashion. Defendants never filed briefs and the court by Decision and Order of December 4 denied their motions to suppress.

The matter was then scheduled for December 15 for purposes of setting a date for trial. Defendants did not appear on that day; however, the government appeared and the case was placed on the trial calendar. It was rescheduled for December 22 to set a date and again, defendants failed to appear and it was further adjourned until December 23 for a meeting. There was no appearance by defendants on that day and it was further adjourned to January 9, 1976 for a pre-trial conference. Shortly thereafter, the indictment was scheduled for trial for March 29, 1976 (A. 47). The government sought a continuance for a few days and the matter was rescheduled for trial for April 6, 1976 (A. 49). Because of the unavailability of defense counsel, it was further adjourned to April 19, 1976 and still further adjourned until May 4, 1976. At that time a jury was empanelled and proof was then scheduled to commence May 7 at which time the government moved to dismiss the indictment, a motion joined in by the defendants. The court then granted the motion and discharged the defendants (A. 51-55).

On June 24, 1976 the defendants were reindicted on different charges, albeit stemming from the same transaction or occurrences of May 26, 1972 (A. 56-58). Five days later the defendants were arraigned and released on bond. Mr. Abramowitz then withdrew as counsel for Sebastian and

present counsel, Robert Macek, was assigned. Discovery motions were then filed and the government responded to those motions and filed its notice of readiness on July 15, 1976 (A. 59). On July 27, 1976 oral arguments were had on the motions and the matter was scheduled for August 4, 1976 for purposes of setting a date for trial. At the request of the defense, it was adjourned until August 11, 1976 at which time there was no appearance by the defendants. On August 13, counsel for Sebastian appeared and the defendants were directed to file any motions against the indictment by September 13, 1976.

On September 20, 1976 Sebastian and Gibbons moved to dismiss the indictment on the grounds of former jeopardy and lack of speedy trial, the latter claim being raised for the first time. The government responded to those motions by filing its memorandum on October 4, 1976. Defendants then filed a memorandum of law on October 26 and the government a reply memorandum on December 6, 1976. Between that time and March 14, 1977 the matter was *sub judice*. The court having denied the defendants' motion to dismiss, defendants timely appealed and this Court affirmed, on September 26, 1977, so much of the March 14, 1977 Decision and Order that denied their motion to dismiss on former jeopardy grounds. *Sebastian II, supra*. Then by notice dated October 4, 1977 the court scheduled a meeting for purposes of setting the date for trial to be held on October 14, 1977. At that time, trial was scheduled for October 25, 1977 at which time the defendants entered their guilty pleas.⁵

⁵ Unless otherwise indicated, the statements made under this heading for the most part appear from the docket entries (A. 1-7).

Questions Presented

1. Was the government ready for trial within the six months as required by the rules?
2. Was trial commenced within 180 days of July 1, 1976, less excludable time, in compliance with the New Plan?
3. Was there a violation of the defendants' Sixth Amendment right to a speedy trial?

ARGUMENT

POINT I

The government was ready for trial within the time limits as required by the rules.

Under the Plan for Prompt Disposition of Criminal Cases, effective April 1, 1973 and the Rules for Prompt Disposition of Criminal Cases adopted by the Western District of New York Pursuant to Rule 50(b) of the Federal Rules of Criminal Procedure, the Interim Plan, effective September 29, 1975, for purposes of complying with the interim limits of the Speedy Trial Act, 18 U.S.C. § 3161, *et seq.* and the Plan for Prompt Disposition of Criminal Cases promulgated pursuant to the Speedy Trial Act of 1974, effective July 1, 1976, the government announced its trial readiness and was ready for trial in a timely fashion.

The first charge against Sebastian and Gibbons came on May 24, 1973 (A. 8). They were indicted on June 21, 1973 (A. 10-12). The government first announced its trial readiness by filing a notice moving the case for trial on November 29, 1973 (A. 2). Again on December 9, 1974, the Assistant United States Attorney announced orally in Court that the government remained ready for trial and asked that a trial date be

set.⁶ Following the return of the superseding indictment on June 24, 1976 which charged separate offenses, *Sebastian I, supra*, and July 15, 1976 the government filed its notice of readiness.

Judge Curtin, in his March 1977 Decision and Order (A. 83-87), held that: since the old indictment was dismissed upon motion of the government and the offense charged in the superseding indictment was the same, the government had to be ready for trial on the superseding indictment within six months from the date of arrest, *i.e.* May 24, 1973; that the notice of July 15, 1976 was the effective notice; and, with certain excludable times which he has detailed in his opinion (A. 87-92), the government on that day was ready within the requisite six months from the date of arrest. Since those findings are not clearly erroneous and no error of law appears, those findings should not be disturbed. *Smith v. Mabry*, 564 F. 2d 249, 252-253 (8th Cir. 1977); *United States v. Johnson*, 327 U.S. 106, 112; *United States v. Boston*, 508 F.2d 1171, 1179 (2nd Cir. 1974); *United States v. Bronstein*, 521 F.2d 459, 463 (2nd Cir. 1975). Adopting that reasoning, the government was timely ready for trial.

In computing time chargeable to the government, the period from arrest, May 24, 1973, to the date of arraignment on the indictment, June 28, 1973, a period of 35 days is so chargeable. On June 28, the defendants were given to July 26 to file motions. That time is excludable under Rule 5(a) of the Old Plan. Between July 26 and December 19 when the suppression hearing was held, there were two adjournments chargeable to the defendants. They agree (Br. 11) and Judge Curtin ruled (A. 88) that the time, a period of 174 days, was excludable.

⁶ This Court has held that it is only necessary that the government communicate its readiness in some fashion, formal notification not being required. *United States v. Masullo*, 489 F.2d 217, 224 (2nd Cir. 1973).

At the conclusion of the suppression hearing and on December 21, 1973, Judge Curtin suppressed the evidence based upon the government's failure to make available to defense counsel materials pursuant to 18 U.S.C. § 3500. The time from that decision until January 14, 1974 when the government filed its notice of appeal, a total of 24 days, is chargeable to the government and the Court so found (A. 91). The Court also found that the period of time from January 14, 1974 until this Court's (*Sebastian I*) reversal became final on September 16, 1974, is excludable. Appellants contend that this time is chargeable to the government because the appeal "... was to vindicate its position on disclosure of Jencks material at pre-trial hearings, and that that motive had little, if anything to do with appellants' case" (Br. 15). To the contrary, had the government not appealed it would not have been able to prosecute since crucial and necessary evidence was suppressed, namely, an admission by Sebastian and identification seized from the presence of Gibbons which identification was used to cash the bonds.

The position of the government at that time was that it would only make available to defense counsel whatever materials were utilized by its witnesses to refresh their recollection for purposes of testifying. When the suppression hearing resumed on June 18, 1975, some three years had passed since the events which formed the basis of the charge against these defendants so that it was necessary for the witnesses at that time to refresh their recollection by reading all their reports. So that while counsel at that point received everything they would have under the Jencks Act at time of trial, it was because the witnesses, Behm and Zona, reviewed all those materials for purposes of giving testimony (A. 37-43). Furthermore, this Court, *Sebastian I*, *supra* at 1270, strongly urged that the government, in a cooperative spirit, turn over these materials in advance of trial. At the time of that continued hearing, considering this Court's urging of co-

operative discovery, the prosecutor was most reluctant to do anything to cause any further delays. Judge Curtin found (A. 90) that there was no evidence of bad faith which would cause him to charge the time to the government and Rule 5(a) of the Old Plan specifically provides that delay caused by interlocutory appeals is excludable.

After the government was notified that a motion to enlarge the time to file a Petition for Certiorari was denied, it placed the matter on the Court's calendar for October 21, 1974. The time then from September 16, or a period of 35 days, is chargeable to the government. Between October 21, 1974 and the time when the renewed suppression hearing was held, June 18, 1975, is non-chargeable to the government. During that period of time there were several adjournments requested by defendants. On July 7, 1974, new counsel was substituted for Sebastian who indicated that he wished an adjournment of the suppression hearing for purposes of putting in psychiatric testimony. It was not until October 6, 1975, that he notified the Court that he wished to submit nothing further. The government timely filed findings of fact and conclusions of law. Neither defendant submitted anything and on December 4, 1975 the Court denied defendants' motion to suppress. This entire time from September 16, 1974 to December 4, 1975 is excludable under Rule 5(a) & (b) of the Old Plan and Rule 6(a) & (b) of the Interim Plan as delay while proceedings concerning the defendants are pending and/or delay attributable to defense counsel (appellants agree that most of this time, at least from January 13, 1975 to December 4, 1975 is excludable (Br. 11)). During this same period, the case was adjourned three times for defendants' failure to appear and three times at defendants' request (see Statement of Facts, p. 5).

As indicated above, on December 9, 1974, the government orally announced its readiness for trial. To that day, the

government was chargeable with only 94 days, well within the 180 day time limitation.

The time between December 9, 1975 and May 4, 1976 when trial commenced, with the exception of a 7 day period from March 29, until April 5 (a 7 day adjournment requested by the government) is excludable pursuant to Rule 6(b) of the Interim Plan. During this period of time, with the 7 day exception, counsel asked for and received several adjournments (see Statement of Facts, pp. 5-6). Judge Curtin so found (A. 91).

The time from dismissal, May 7, 1976 to re-indictment, June 24, 1976 is excludable. *United States v. Flores*, 501 F.2d 1359-60 (2nd Cir. 1974). The time between June 24 and July 15, when the government filed its notice of readiness, or 22 days, is chargeable to the government (A. 92). Thus the total time chargeable to the government between the time of arrest, May 24, 1973 to the filing of the second notice of readiness on July 15, 1976 is 123 days. The government therefor, was in compliance.

The government also believes it has a strong argument that the time clock for purposes of being ready for trial commencement runs anew with the new indictment charging separate offenses. While it is true that the government would have to be ready for trial within six months of arrest or charge, not counting excludable time, even in a case of re-indictment following a *government* requested dismissal, that is so only where the re-indictment is for the *same offense*. 18 U.S.C. § 3161(h)(6) and Rule 5(d)(3) of the New Plan promulgated pursuant thereto indicates that the time period within which a trial must commence begins to run on the date of arrest or the date of the first indictment *unless* the new charge is *not* for the same offense. Rule 5(f)(3) of the New Plan provides that:

"in the event that a[n] . . . indictment . . . is filed against a defendant charged in a pending indictment . . . or in an indictment . . . dismissed on motion of the United States Attorney, the trial on the new charge shall commence within the time limit for commencement of trial on the original indictment . . . unless the Court finds that the new charge is not for the same offense charged in the original indictment . . ."

This Court has held, *Sebastian II*, *supra*, 214-215, that the new indictment charges *different offenses*. In that event this case is likened to *United States v. Cumberbatch*, 563 F.2d 49 (2nd Cir. 1977) as opposed to *United States v. Masullo*, *supra*, in other words, the time begins with the new charge.

In *Cumberbatch*, *supra*, the defendant was indicted for bank robbery in February, 1973. On his motion the indictment was dismissed on December 13, 1976 and a new indictment was returned to the Court charging the same defendant with conspiracy to commit bank robbery and unlawfully possessing a firearm. There the appellant argued that the government's notice of readiness filed at the same time as the supplemental (superseding) indictment was not timely because the time within which the government had to be ready related back to the original charge. This Court rejected that argument relying on Rule 5(d)(5) of the New Plan which provides that:

"the time within which an indictment or information must be obtained on the subsequent charge, or within which an arraignment must be held on such charge, shall be determined without regard to the existence of the original indictment or information."

In *Masullo*, *supra*, this Court held that in determining readiness for trial on a superseding indictment the time began with the arrest on the first indictment because there, the superseding indictment charged precisely the same crime, namely, distribution of amphetamine in violation of 21 U.S.C. § 841(a)(1).

While under the appellees' and Judge Curtin's analysis, the government's notice of readiness filed November 29, 1973 is irrelevant, the appellee urges that it was ready at that time and the notice was not "meaningless" as claimed by the appellants. *United States v. Lane*, 561 F.2d 1075, 1078 (2nd Cir. 1977); *United States v. Pollak*, 474 F.2d 828, 830 (2nd Cir. 1973).

In this regard, Sebastian and Gibbons claim that that notice of readiness was "meaningless" because it was obvious on May 7, 1976 when the government moved to dismiss the indictment that it was not ready for trial.⁸ Judge Curtin specifically found (A. 84, 96) that: "this is not a case where the government knew it was not prepared for trial and merely filed its notice of readiness to technically comply with the statute. See *United States v. Blauner*, 337 F. Supp. 1383, 1388-1389 (S.D.N.Y. 1971)." The government was prepared at that time to present its evidence in support of the indictment.

POINT II

The requirement of commencing trial within 180 days was met when the defendants entered their guilty pleas on October 25, 1977.

The New Western District Plan for Prompt Disposition of Criminal Cases effective July 1, 1976 as promulgated pursuant to the Speedy Trial Act requires that, with certain excludable periods, trial commence within 180 days of July 1, 1976. That date without taking into consideration excludable periods would have been December 27, 1976. *United States v. Carini*, 562 F.2d 144, 147 n.2 (2nd Cir. 1977); *United States v. Lane*, *supra*, at 1078.

⁸ The appellants concede at page 9 of their brief that although the notice was filed five days after the expiration of six months, more than five days was properly excluded under Rule 5(a) of the Old Plan.

In computing the 180 day period, the following periods of time are excludable pursuant to 18 U.S.C. § 3161(h) and Rule 10(a) of the current plan: the period from July 13, 1977 when discovery motions were filed to July 27, 1976 when a decision was rendered on those motions (with the exception of four days chargeable to the government) pursuant to 3161(h)(1)(E); the period from August 13, 1976 when defendants were directed to file their motions against the indictment by September 13 until the Decision and Order on those motions of March 14, 1977 (with the exception of a 30-day period as reflected on the docket sheets (A. 6)) pursuant to 3161(h)(1)(E); and the period of time from March 23, 1977 when the defendant filed their notice of appeal until October 21, 1977 when the mandate of this Court was filed, pursuant to 3161(h)(1)(D). That excludable time is reflected on the docket sheets (A. 6-7). Therefore, between July 1, 1976 and October 25, 1977, all but approximately 40 days are excludable.

Even if Sebastian and Gibbons can argue that the time chargeable to the government is such that, at the time they entered their guilty pleas, more than 180 days ran, dismissal of the indictment is not mandated until July 1, 1979. See *United States v. Carini*, *supra*, at 148.

POINT III

Defendants' Sixth Amendment speedy trial rights were not violated.

A constitutional challenge to an accused's Sixth Amendment right to a speedy trial is usually analyzed in terms of the balancing test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). The four factors to be evaluated under this balancing test are: (1) the length of delay; (2) the reason for the delay; (3) whether and when the defendant has asserted his right to a

speedy trial; and (4) the prejudice resulting to the defendant from the delay. These four factors are only the primary components of the balancing test, and they "must be considered together with such other circumstances as may be relevant". *Barker v. Wingo, supra*, at 533; accord, *United States v. Vispi, supra*, 333 (2nd Cir. 1976). One additional circumstance which is relevant is whether there has been a violation of the Speedy Trial Act or the Western District Plan. *United States v. Carini, supra*, 148 (2nd Cir. 1977).

Length of Delay

The delay in this case is 53 months from the date of arrest. Although quite long, length alone is not dispositive of the issue (*United States v. Vispi, supra*; *United States v. Carini, supra*). It is shorter than the delay in other cases in which no Sixth Amendment violation has been found *Barker v. Wingo, supra*, 5 years; *United States v. Saglimbene*, 471 F.2d 16 (2nd Cir. 1972), 6 years; *United States v. Lane*, 561 F.2d 1075 (2nd Cir. 1977), 58 months.

Reason for Delay

The major portion of delay is due primarily to defendants' repeated failure to appear and defendants' own requests for adjournments and to the fact that various motions and appeals were pending. The government's appeal in *Sebastian I* consumed 9 months. After that decision became final, defendants repeatedly failed to appear and requested adjournments causing the suppression hearing and ruling thereon to be postponed for 14 months from October 21, 1974 to December 4, 1975. Some of this time was taken up by the substitution of counsel for defendant Sebastian. For example that counsel requested continuances from June 18, 1975 to October 6, 1975 when he finally advised the Court he did not wish to submit anything further in connection with the suppression hearing.

While the defendant is not to be penalized for the time necessary for new counsel to become familiar with the case, neither is this time to be weighed heavily against the government. This is especially so when the government communicated its readiness for trial orally on December 9, 1974 and advised counsel to communicate Speedy Trial claims on July 26, 1975 (footnote p. 6). With the exception of a brief period of time chargeable to the government, the defense was responsible for an additional approximate 6 months from October 21, 1975 to May 4, 1976.

Defendants' motion to dismiss the superseding indictment was under advisement in the District Court for nearly 6 months from September 20, 1976 to March 14, 1977. Defendants' appeal in *Sebastian II* consumed 7 months from March 23, 1977 to October 21, 1977.

Out of a total elapsed time of 53 months, nearly 42 months is taken up by "institutional" delay and delay attributable to defendants. While "ultimately" and "technically" the government is to be responsible for "institutional" delay, *Barker v. Wingo, supra*, at 531; and *United States v. Carini, supra*, at 149, such delay is not counted as heavily against the government. *United States v. Carini, supra*, at 150.

In *United States v. Lane, supra*, under similar circumstances, this Court did not find a violation of defendants' Sixth Amendment right to a speedy trial. The Court said at 1078-1079:

"there was a number of reasons for the delay, but appellant and his counsel were responsible for much of it with their repeated requests for continuances; his first counsel's illness and death were also contributing factors. Some of the delay was caused by institutional factors. Particularly the unavailability of another Judge when Judge Burke became ill . . . While the record here contains some rather long unexplained delays, there is no

indication that these are attributable either to deliberate procrastination or even negligent inaction on the part of the government."

Over the course of the 4 1/2 year history of this case, the time directly attributable to the government cannot be said to be the result of "deliberate procrastination" whereby the government seeks to obtain a "tactical advantage" over the defendants. This case is unlike *United States v. Carini, supra*, where the government wrongfully offered a plea bargain; and *United States v. Roberts*, 515 F.2d 642 (2nd Cir. 1975), where the government withheld a plea bargain in exchange for testimony. The delay which the appellants argue was the fault of the government was time within which the government legitimately pursued its right to appeal (*Sebastian I*) and to re-indict. In addition, the government gave its notice of readiness for trial on three occasions (November 29, 1973; December 9, 1974; July 15, 1976), advised the defendants to communicate any speedy trial claims (letter of June 26, 1975), asked only for three minor adjournments, and always appeared as scheduled.

Therefore, the factor of reason for delay should not be weighed heavily against the government.

Assertion of Right

The third factor, assertion of the Speedy Trial right, should be weighed against the defendants. The only assertion of the right to speedy trial came on September 20, 1976, three years and four months after the date of arrest. Certainly on May 7, 1976, the defendants could have insisted upon going forward. Instead, they joined in the motion to dismiss. *Sebastian II, supra* 213.

This is not a case where the defendants "repeatedly and energetically asserted his right" to a speedy trial throughout the prosecution. *United States v. Vispi, supra*. Rather, it is a

case where the defendants have given the impression that they never wanted a speedy trial, only a dismissal. *United States v. Green*, 526 F.2d 212, 214-215 (8th Cir. 1975); *Morrison v. Jones*, 565 F.2d 272, 274 (4th Cir. 1977); *United States v. Lane*, *supra*. *United States v. Fasanaro*, 474 F.2d 717, 718 (2nd Cir. 1973).

Although defendants' delay in bringing the motion does not constitute a waiver, it is a reflection of defendants' failure to assert their right even when clear opportunities presented themselves. Importantly, defendants never claimed a violation of their right even upon receipt of the government's correspondence so advising them.

The Supreme Court observed in *Barker v. Wingo*, *supra*, at 531-532:

"Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right."

The government asserts, therefore, that since these defendants never actively asserted their rights to a speedy trial and moreover, may have waived that right, the third factor of the *Barker v. Wingo* test should be weighed against them.

Prejudice

In discussing the factor of prejudice, the Supreme Court in *Barker v. Wingo*, *supra*, at 532, identified three interests which Sixth Amendment was designed to protect:

1. To prevent oppressive pre-trial incarceration;
2. To minimize anxiety and concern of the accused;
3. To limit the possibility that the defense will be impaired.

Here, there has been no hardship or prejudice caused to the defendants by any delay in obtaining a speedy trial. Both defendants have been free on bail since May 24, 1973, never having been incarcerated under either indictment. Neither defendant has suffered an infringement of their freedom to move about or carry on a livelihood.

Since defendants have plead guilty, the ability to present a defense has not been impaired (Appellants' Br. 20).

The only prejudice asserted by the defendants is that they have been subject to prolonged anxiety, a claim made successfully there. However, unlike the appellant in *United States v. Vispi*, *supra*, these appellants have not attempted to show that their anxiety is different from the usual anxiety accompanying pending criminal charges, or to show any adverse effect on their moral, their income, or their reputation. *United States v. Lane*, *supra*, at 1079. This Court has said that prejudice cannot be presumed and that the balancing test elucidated in *Barker v. Wingo*, *supra*, contemplates a showing of actual prejudice. *United States v. Roemer*, 514 F.2d 1377, 1383 (2nd Cir. 1975).

Even if appellants' bald assertion of prejudice is accepted, it is not sufficient to tip the scales so as to find a constitutional violation.

One additional factor to be considered is whether there has been any violation of the Speedy Trial Rules, Plan or Act. As discussed in Points I and II, there has been no violation. Aside from institutional delay and delay attributable to the defendants, the government has always moved this case along promptly.

On balance, the factors considered weigh more heavily against the defendants. Much of the delay was either caused by the defendants or consisted of "neutral" institutional delay. The defendants only once asserted their Sixth Amendment right, and this came very late in the case. They have not suffered any prejudice due to pre-trial incarceration or to impairment of their defense. There has been no violation of any of the applicable speedy trial rules. Therefore, although lengthy, the delay here is not of a magnitude to warrant a dismissal based upon a violation of the Sixth Amendment right to a speedy trial.

While the District Court retains inherent power to dismiss a case for lack of prosecution, the power is a discretionary one. Judge Curtin's refusal to dismiss was not an improper exercise of that discretion. As this Court has said, where a delay does not violate any of the rules or Speedy Trial Act it is highly unlikely that the District Court's refusal to dismiss would be an abuse of discretion. See *Lane*, at 1078 and Judge Mulligan's dissent in *Vispi* at 335.

Conclusion

For all of the above reasons, the judgment of conviction of each defendant should, in all respects, be affirmed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss. : USA vs. Anthony James Sebastin & Patrick
City of Batavia) Gibbons
77-1504

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

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Leslie R. Johnson

Sworn to before me this

24th day of March, 19 78

Patricia A. Lacey

